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WESTERN DISTRICT OF TEXAS  
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CLERK, U.S. DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
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UNITED STATES OF AMERICA,

Respondent(s),

Vs.

HORACIO LICANO PACHECO,

Movant

Cause No.:

3:11-cr-01827-KC-6

Civil Action No:

EP-14-CV-384-KC-6.

DEFENDANT'S REPLY TO GOVERNMENTS RESPONSE  
TO MOTION UNDER TITLE 28 USC SECTION 2255 TO  
VACATE SET ASIDE, OR CORRECT SENTENCE

COMES NOW, Horacio L. Pacheco, hereinafter referred to as Movant, acting in pro se status in the above styled and entitled cause of action and submits the following Traverse to the government's opposition to the Section 2255 motion<sup>1</sup>. This traverse includes and incorporates by reference the factual allegations, verified pursuant to 28 U SC § 1746, pursuant to 28 USC §1746, and the legal argument set forth in Mr. Pacheco Section 2255 motion.1.

Movant Pacheco contends in his Section 2255 Motion that counsel rendered ineffective assistance of counsel based on his failure act as an advocate during the sentencing process. As a result his sentence is violative of the Sixth Amendment constitutional right to effective assistance of counsel in the plea and sentencing process as hereinafter more fully appears. Movant Pacheco further submits that his sentence is violative of his Sixth Amendment constitutional right to effective assistance of counsel 's hereinafter more fully appears.

1. hereinafter be "Government's Response" [page References to Pacheco's Section 2255 motion will be denominated "Section 2255 Motion [page or paragraph]". Unless otherwise indicated, any references to paragraphs in the Section 2255 motion will refer to the numbered paragraphs of the "Statement of Claim" of the motion.

## STATEMENT OF FACTS AND PROCEDURAL HISTORY

Movant Pacheco generally agrees with the Statement of Facts and Course of Proceedings.

He does submit issue with some of the purported characteristic factors resulting in several unwarranted enhancements to boost the guideline level for the purpose of sentencing.

On July 27, 2011, Movant was charged by Indictment under seal along with 17 other co-defendants. At all times relevant to Movant's Plea and Sentencing, he was represented by Trial Attorney Robert R. Harris of the law Office the Law Office of Robert R. Harris, whose office was located at 521 Texas Avenue, El Paso, Texas 79901.

Movant submits that the verifiable evidence of his involvement was of a short period, in the range of four months, in the eight year in the drug conspiracy. Despite no mention of the use a firearm or the making of a credible threat with a which firearm in the factual statement, which was made part of the plea agreement the Court made findings supporting a two level enhancement under U55u §2D1.1(b)(i) and another two level enhancement under §2D1.1(b)(2). The Court also found that movant did not qualify for a two level deduction under USSC §2D1.1(b)(16), and went on to erroneously apply another two level enhancement under that guideline provision. The findings increased the movant's period of imprisonment by almost 100 months.

The plea agreement indicated that the only sentencing factors that would be taken into account for enhancement and reduction purposes were "Acceptance of Responsibility" and "Offense Role". (See Exhibit 1 - Movant's Plea Agreement, at pg. 2). Prior to advising Movant to accept the terms of the plea agreement, counsel informed movant that there would be no guideline enhancement applied to his sentence relating to conduct involving a firearm. Movant's Sworn Affidavit, at 112).

At sentencing, counsel objected to the enhancements based on the firearm conduct,, but to no avail. Prior to the sentencing evidentiary hearing, movant informed counsel of two witnesses, Rogelio Macias and Luis government's Serrano, who would contradict evidence the government presented that Movant used a firearm to threaten Macias. (See Movant's Affidavit at p.3). Counsel did not peruse, subpoena, or interview these two witnesses.

ISSUES PRESENTED

- 1.) MOVANT PACHECO HAS IN FACT AND LAW STATED A PRIMA FACIE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IN THE PLEA AND SENTENCING PROCESS.

Movant Pacheco submits that he was denied the constitutional right to effective assistance of counsel in the plea and sentencing process as hereinafter more fully appears. Movant Pacheco further submits that his conviction and sentence is violative of her Sixth Amendment constitutional right to effective assistance of counsel in investigation of the facts regarding the consequences of entering a guilty plea as opposed to going to trial, negotiation of the plea, and preparation for sentencing and in the sentencing process as hereinafter more fully appears.

Counsel's omissions as set forth in this traverse were based on an incomplete investigation of the law, and sentencing guidelines relevant to Movant plea, and sentencing processes.

The government also has responded to Movant Pacheco's Section 2255 Motion but addresses the Movant Pacheco claims in principle but not in fact by mischaracterizing his allegations, the record, and the basis of his claim. There is sufficient reason to believe that there is "a reasonable probability" he would have received a lower term of imprisonment if he'd been competently advised during the plea process and adequately represented during the plea and sentencing process.

In the governments brief, their attorney has argued that Movant Pacheco claim of ineffective assistance of counsel in the plea process, and sentencing process should be denied because the affidavit of Attorney Harris contradicts the allegations of Movant. In fact, careful review of both the affidavit of Attorney Harris and the affidavit of Movant Pacheco, supplemented by Affidavit "A" submitted with this traverse demonstrates that, even if believed completely, the affidavit of Attorney Harris does not address much less rebut all material allegations of the affidavit of the Movant.

Based on the foregoing, this Court should find that while the government has submitted the affidavit of Attorney Harris is to attempt to rebut Movant's claim of ineffective assistance of counsel in the plea and sentencing processes.

1 The affidavit of Counsel does not directly rebut all material allegations of  
2 Section 2255 motion and the supplemental affidavit filed with this traverse.

3 MATERIAL FACTUAL DISPUTES EXIST IN THIS CASE WHICH  
4 MANDATE THE COURT TO GRANT AN EVIDENTIARY HEARING

5 COUNSEL'S OTHER ARGUMENTS ARE ADEQUATELY ADDRESSED  
6 STATEMENT OF CLAIM AND MEMORANDUM ARE INCORPORATED  
IN PACHECO'S SECTION 2255 MOTION

7 ISSUES PRESENTED

- 8 1. Movant was deprived of his sixth amendment right to the effective  
9 assistance of counsel where counsel failed to pursue, subpoena and  
10 interview two witnesses that would have provided exculpatory  
11 testimony negating a judicial finding that movant conduct supported a  
4 level guideline enhancement under U. S.S. G. 2d1.(b) (1) and B(2).
- 12 2. Movant was deprived of his sixth Amendment right to the effective  
13 assistance of counsel where counsel failed to object to the erroneous  
14 application of U.S.S.G 2D1.1(b) (16), resulting in a two level increase  
that was not authorized by that guideline provision.
- 15 3. Movant was deprived of his sixth amendment right to the effective  
16 assistance of counsel where counsel advised him to accept an  
17 ambiguous plea agreement which exposed him to a 4 level  
enhancement and rendered his guilty plea involuntary.

18 ISSUE I

19 Movant Pacheco restates, repleads, and realleges the facts, pleadings and  
20 allegations set forth in her 2255 claim.

- 21 1. Movant was deprived of his sixth amendment right to the effective  
22 assistance of counsel where counsel failed to pursue, subpoena and  
23 interview two witnesses that would have provided exculpatory  
24 testimony negating a judicial finding that movant conduct supported a  
4 level guideline enhancement under U. S.S. G. 2d1.(b) (1) and B(2).

25 Under U. S.S. G. 2d1.(b) (1) and B(2).Specific Offense Characteristics;  
26

1 (1) If a dangerous weapon (including a firearm) was possessed,  
2 increase by 2 levels.

3 (2) If the defendant used violence, made a credible threat to use  
4 violence, or directed the use of violence, increase by 2 levels.

5 Movant argues that the sentencing enhancements for being an  
6 unconstitutional. He raises the claims that because these enhancements relied on facts  
7 not alleged in the indictment, not submitted to a jury, not proven beyond a reasonable  
8 doubt, and were not plead to by the Movant. The enhancements should be vacated.  
Counsel could have but did not provide available and persuasive authority in support of  
argument against the enhancements at sentencing.

9 In 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), Apprendi v. New Jersey,  
10 530 U.S. 466, 490 the Supreme Court held that "[o]ther than the fact of a prior  
11 conviction, any fact that increases the penalty for a crime beyond the prescribed  
12 statutory maximum must be submitted to a jury, and proved beyond a reasonable  
13 doubt." The question that Apprendi forces the Court to answer whether "the required  
14 finding expose[s] the defendant to a greater punishment than that authorized by the  
jury's guilty verdict?" *Id.* at 494, 120 S.Ct. 2348.

15 In general, the government bears the burden of proving, by a  
16 preponderance of evidence, the facts necessary to enhance a defendant's offense level  
17 under the Sentencing Guidelines. See United States v. Burnett, 16 F.3d 358, 361 (9th  
Cir.1994).

18 However, when a sentencing factor has an extremely disproportionate  
19 effect on the sentence relative to the offense of conviction, due process requires that the  
20 government prove the facts underlying the enhancement by clear and convincing  
21 evidence. See United States v. Jordan, 256 F.3d 922, 926 (9th Cir.2001). Counsel could  
22 have but did not provide available and persuasive authority in support of argument  
against the enhancements that were used to bolster her sentencing guideline level.

23 Counsel's omissions set forth herein were based on an incomplete  
24 investigation of the law relevant to Movant sentencing process. Counsel could have, but  
25 failed to investigate relevant case law relevant to all aspects of the offenses surrounding  
26 the Movant. On November 30, 2009 in Porter v. McCollum, the US Supreme Court held  
that failure to investigate mitigating factors prior to sentencing can be a Strickland  
violation and hence a 6th Amendment violation.

1 Counsel failed to advocate on the part of the Movant, misadvised and mislead  
2 him as to what he reasonable could expect in the range of sentencing, and failed to  
3 conduct a sentencing hearing with witnesses to rebut the allegations that were the basis  
4 of the enhancements.

5 Where a defendant's substantial rights are violated, our court retains discretion  
6 to correct the reversible plain error only if it seriously affects the fairness, integrity, or  
7 public reputation of judicial proceedings. Puckett, 129 S. Ct. at 1429. The substantial  
8 disparity between the imposed sentence and the applicable Guidelines range warrants  
9 the exercise of our discretion to correct the error. See United States v. Gonzalez-  
Terrazas, 529 F.3d 293, 299 (5th Cir. 2008) (concluding that the imposition of a  
sentence that was substantially greater than the Guidelines range affected the  
defendant's substantial rights and the fairness of the judicial proceedings

## 10 CLAIM II

11 Movant Pacheco restates, repleads, and realleges the facts, pleadings and  
12 allegations set forth in his 2255 claim.

- 13 1. Movant was deprived of his sixth Amendment right to the effective  
14 assistance of counsel where counsel failed to object to the erroneous  
15 application of U.S.S.G 2D1.1(b) (16), resulting in a two level increase  
16 that was not authorized by that guideline provision. Counsel could have  
17 but did not make contemporaneous objection to this error. By failing to do so,  
18 Counsel's omissions set forth in this claim were based on an  
19 incomplete investigation and knowledge of the law and of the  
20 sentencing guidelines which prejudiced Pacheco during the plea and  
21 sentencing process

22 Counsel could have but did not investigate Case law and guideline  
23 provisions m which favors launching objections in order to preserve issues, objections  
24 must be made to errors. See: Woodfox v. Cain (5th. Cir., 2010), remanding based on  
25 Ineffective Assistance due to Counsels failure to make proper objections.

26 Counsel's omissions set forth in were not the result of reasoned decisions  
based on strategic or tactical choices among all plausible options available to counsel for  
the defense of the Pacheco during the plea and sentencing process.

Counsel could have but did not provide available and persuasive authority  
in support of argument against the 2 level increase under 2d1. The outcome of this



1 failure prejudiced the Movant by effecting a higher guideline level for the purpose of  
2 sentencing.

3 Counsel's omissions set forth in the record were the result of counsel's  
4 abdication of the duty and responsibility to advocate, case and cause during  
5 the plea and sentencing process. Pacheco was prejudiced from the unprofessional  
6 omissions of counsel, set forth in the record because, absent said omissions, there  
7 is a reasonable probability that the outcome of sentencing process would have been  
8 different.

9 Movant Pacheco was prejudiced from the unprofessional omissions of counsel,  
10 set forth in this claim because said omissions undermine confidence in the reliability of  
11 this process.

### 12 CLAIM III

13 Movant Pacheco restates, repleads, and realleges the facts, pleadings and  
14 allegations set forth in her 2255 claim.

15 Movant was deprived of his sixth amendment right to the effective assistance of  
16 counsel where counsel advised him to accept an ambiguous plea agreement which  
17 exposed him to a 4 level enhancement and rendered his guilty plea involuntary. Case  
18 law in support of Movant's contentions: United States v. Sanderson, 595 F.2d 1021 (5th  
19 Cir. 1979) "It is axiomatic that a guilty plea "lacks the required voluntariness and  
20 understanding if entered on advice of counsel that fails to meet the minimum standards  
21 of effectiveness derived from" the Sixth Amendment. Trahan v. Estelle, 544 F.2d 1305,  
22 1309 (5th Cir. 1977). In advising an accused whether or not to plead guilty, counsel's  
23 duty is to determine if the plea is voluntarily and knowingly made. *See: Carbo v. United*  
24 *States*, 581 F.2d 91, 93(5th Cir. 1978). Also see: United States v. Giardino , 797 F.2d 30,  
25 32 (1st Cir. 1986) vacated;

26 Movant was prejudiced by Counsel's failure to understand and effectively  
advise him with respect to his sentencing exposure and the risks and  
consequences as part of the Plea Agreement.

The Supreme Court recently confirmed that a defendant's Sixth Amendment right to  
counsel extends to the plea-bargaining process. See Lafler v. Cooper, 132 S. Ct. 1376,  
1384 (2012). If it is ineffective assistance to fail to inform a client of a plea bargain, it is equally  
ineffective to fail to advise a client to enter a plea bargain when it is clearly in the client's best  
interest. See Boria v. Keane, 99 F.3d 492, 497 (2d Cir.1996) (examining counsel's failure to

1 advise client of wisdom of accepting a plea). Therefore, [the defendant] will state a claim under  
 2 the Sixth Amendment if his counsel's] conduct in delaying[the defendant's] plea was "outside  
 3 the wide range of professionally competent assistance." Strickland v. Washington, 466 U.S.  
 4 668, 690, 104 S. Ct. 2052[.]. United States v. Leonti, 326 F.3d 1111, 1117 (9th Cir. 2003).  
 5 performance of his attorney. Section 2255 is the proper venue for raising this claim. (See  
 6 United States v. Grammas, 376 F3d 433, 439 (5th Cir. 2004).

7 Movant submits that he has made this showing. Pacheco challenges his  
 8 sentence on multiple grounds, the basis of which claims of "ineffective assistance of  
 9 counsel."

10 Among the reason justifying the Issue of Ineffective of Counsel is evident  
 11 in the prima facie case he has established regarding counsel's performance. In theory  
 12 they are the byproduct of the below standard performance by counsel because the issues were  
 13 not raised previously thereby failing to preserve them for appeal.

14 Pacheco claims it is clear from the record that there were issues with the  
 15 representation and that counsel's performance was deficient. "A court considering a claim of  
 16 ineffective assistance must apply a 'strong presumption' that counsel's representation was within  
 17 the 'wide range' of reasonable professional assistance." Harrington v. Richter, 131 S.Ct. 770,  
 18 787 (2011) (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)).

#### 19 REVIEW STANDARDS

20 A motion for relief under § 2255 follows the procedures established  
 21 by the "Rules Governing Section 2255 Cases in the United States District Courts"  
 22 (hereinafter, the "Rules"). The text of § 2255 states that, "[u]nless the motion and  
 23 the files and records of the case conclusively show that the prisoner is entitled to no  
 24 relief, the court shall cause notice thereof to be served upon the United States attorney,  
 25 grant a prompt hearing thereon, determine the issues and make findings of fact and  
 26 conclusions of law with respect thereto." 28 U.S.C. §2255 (emphasis added).

Similarly, the Rules dictate that, upon initial consideration by the assigned  
 District Judge, a 2255 motion should be dismissed only "if it plainly appears from the  
 motion, any attached exhibits, and the record of prior proceedings that the moving party  
 is not entitled to relief." Rule 4(b) (emphasis added). In all other cases, "the judge must  
 order the United States attorney to file an answer, motion, or other response within a

fixed time, or to take action the judge may order." The Rules also authorize,  
 where appropriate and by order of the Court, discovery proceedings, an expansion of the  
 record, and an evidentiary hearing.



1 Subsequent to the "Preliminary Review" stage set out in Rule 4, the  
2 ultimate legal standard for motions brought pursuant § 2255 is prescribed by statute:

3 "If the court finds that . . . the sentence imposed was not authorized by  
4 law or otherwise open to collateral attack, or that there has been such a denial or  
5 infringement of the constitutional rights of the prisoner as to render the judgment is  
6 subject to collateral attack, the court shall vacate and set the judgment aside and shall  
7 discharge the prisoner or resentence him or grant a new trial or correct the sentence as  
8 may appear appropriate."

9 Ineffective assistance of counsel claims are rarely pursued on direct  
10 appeal, for the simple reason that they almost always require the development of facts  
11 beyond the appellate record. When such claims are raised on direct appeal, "in the vast  
12 majority of cases, the undeveloped record on direct appeal will be insufficient for an  
13 appellant to satisfy the dual prongs of *Strickland*."

14 This necessarily means that in pursuing a claim of ineffective assistance of  
15 trial counsel, the habeas applicant will *not* have the benefit of a lawyer's previous work,  
16 or of a record already adequate to allow him to present his *pro se* arguments  
17 meaningfully in an attempt to persuade the habeas court to exercise its discretion to  
18 examine the merits. He is effectively on his own as surely as the direct appellant in  
19 without the benefit of counsel's knowledge and skill in trying to raise a complex claim in  
20 what was realistically the first available judicial forum.

21 **A. Ruling That The "Facts" Supporting A Claim Of Ineffective Assistance  
22 Do Not Include The Norms Of The Legal Profession**

23 In order to assert a claim of ineffective assistance, a prisoner must allege that the  
24 attorney's conduct was unreasonable under the prevailing norms of the legal profession.

25 Absent the existence of such norms and an unreasonable deviation there from,  
26 there is no basis for a claim of ineffective assistance. As this Court explained in United  
States v. Loughery, 908 F.2d 1014 (D.C. Cir. 1990), in the ineffective assistance context  
[t]he proper measure of an attorney's performance is "reasonableness under prevailing  
professional norms." "Prevailing norms of practice," such as those reflected in the *ABA  
Standards*, may inform our determination of what is reasonable. *Id.* at 1018 (quoting  
*Strickland v. Washington*, 466 U.S. 668, 688 (1984)) (internal citations omitted).

The prevailing norms of the legal profession—like those of other  
professions—are *facts*. *See, e.g., Williams v. Callahan*, 938 F. Supp. 46, 50 (D.D.C.

1 1996) (claim for legal malpractice based upon ineffective assistance of criminal trial  
2 counsel "require[s] the testimony of an expert witness" to establish standard of care for  
3 trier of fact); Int'l Tele-Marine Corp. v. Malone & Assocs., Inc., 845 F. Supp. 1427, 1434  
4 (D. Colo. 1994) ("whether an attorney exercised a reasonable degree of care or skill in  
5 representing its [sic] client is a question of fact"). *See also* Leighton Decl. ¶ 71.  
6 Nevertheless, Judge Johnson ruled that the norms of the legal profession are not facts,  
7 and that a prisoner's lack of knowledge of such norms has no bearing on whether the  
8 prisoner knows the facts supporting a claim of ineffective assistance. Pollard, 161 F.  
9 Supp. 2d at 10.

10 A prisoner who does not know that the attorney deviated from norms of the legal  
11 profession lacks knowledge of facts necessary to assert a claim of ineffective assistance.

12 For example, a defendant may be present in the courtroom while his attorney  
13 fails to do certain things (e.g., fails to object to a breach of a plea agreement). Frequently,  
14 the defendant will be oblivious to that failing, and will remain oblivious until he  
15 becomes aware of the fact that the attorney had a duty to perform these tasks. The  
16 Supreme Court has observed that "[a] layman will ordinarily be unable to recognize  
17 counsel's errors and to evaluate counsel's professional performance; consequently a  
18 criminal defendant will rarely know that he has not been represented competently until  
19 after trial or appeal, usually when he consults another lawyer about his case."

20 Kimmelman v. Morrison, 477 U.S. 365, 378 (1986) (emphasis added) (internal  
21 citation omitted). *See also* Nell v. James, 811 F.2d 100, 105 (2d Cir. 1987) (where  
22 counsel had failed to tell the court at suppression hearing that defendant resided in  
23 premises and therefore had standing to challenge search, defendant's lack of recognition  
24 that counsel had acted ineffectively "is a credible explanation for his failure to present  
25 the [ineffective assistance] claim earlier"); Flanagan v. Johnson, 154 F.3d 196, 199 (5th  
26 Cir. 1998) ("The factual predicate of [prisoner's] claim [was] the fact that he was called  
to testify and did not know," because trial counsel had not informed him, that "he had  
the right to refuse" to testify; AEDPA's statute began to run when prisoner learned both  
facts).

Once made aware of the attorney's duties, the defendant has actual  
knowledge of the facts, and can assert a claim of ineffective assistance. *See* United States  
v. Smith, 101 F. Supp. 2d 332, 347 (W.D. Pa. 2000) (defendant was oblivious to  
counsel's duty to request adjournment of sentencing; only when he learned that fact  
years later did AEDPA's statute of limitations begin to run).

The Supreme Court has instructed that "[f]ederal habeas corpus practice, as reflected by the decisions of this Court, indicates that a court has broad discretion in conditioning a judgment granting habeas relief. Federal courts are authorized, under 28 U.S.C. § 2243, to dispose of habeas corpus matters 'as law and justice require.'"; Hilton v. Braunskill, 481 U.S. 770, 775, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987) (internal quotation marks omitted).

Movant has demonstrated that the government does not rebut all material allegations of his claim. To the extent, however, that the factual allegations of statements have been rebutted by extra-record material, this mandates further factual development in the form of either discovery or an evidentiary hearing as set forth in the 28 U.S.C. § 2255, Rule 4 of the Rules Governing Section 2255 Proceedings, and the case law cited above. Pacheco has requested an evidentiary hearing<sup>5</sup> to resolve extra-record material factual issues as part of his original Section 2255 motion. He also requested leave of the Court to conduct discovery<sup>2</sup> and has renewed that request by motion included with this traverse.

The extra-record facts have now been put in issue by the government's response to Pacheco's Section 2255 motion and Movant has outlined the disputed issues of material fact in this traverse. The disputed issues cannot be determined from either the files or records of this case or from the Court's recollection of events because they occurred outside the courtroom and outside the presence of the Court.

Since both the plain language of 28 U.S.C. § 2255 and case law construing this section mandate that the material factual disputes be resolved as part of the Court's determination of the Section 2255 motion, the Court should either grant an evidentiary hearing on the basis of the present record or grant leave to employ the processes of discovery. Based on all of the foregoing, this Court should find that material factual disputes exist in this case which mandate the Court to grant an evidentiary hearing.

<sup>2</sup>See also United States v. Galloway, 56 F.3d 1239, 1240 [n.1] (10th Cir. 1995) (en banc) (A hearing is required "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief") and Ciak v. United States, 59 F.3d 296, 306-07 (2nd Cir. 1995) (District Court should have granted evidentiary hearing because movant "alleged facts, which, if found to be true, would have entitled him to habeas relief") and Shaw v. United States, 24 F.3d 1040, 1043 (8th Cir. 1994) (District Court erred by denying evidentiary hearing on allegations of ineffective assistance of counsel that were neither inadequate on their face nor conclusively refuted by the record) and United States v. Blaylock, 20 F.3d 1458, 1465 (9th Cir. 1994) (evidentiary hearing required unless § 2255 motion, files, and trial record "conclusively show" Movant entitled to no relief) and Virgin Islands v. Weatherwax, 20 F.3d 572, 573 (3rd Cir. 1994) (Movant entitled to evidentiary hearing on ineffective assistance of counsel claim where facts viewed in light most favorable to Movant would entitle him to relief) and United States v. Magini, 973 F.2d 261, 264-65 (4th Cir. 1992) (Movant entitled to evidentiary hearing when motion presented colorable claim and material facts beyond the record are in dispute) and Federal Habeas Corpus Practice and Procedure, § 41.5b [n. 9], § 41.6d [n. 10-13] (3rd Ed. 1998 (same)). Where a case presents extra-record material factual issues which turn upon a credibility determination of the witnesses, such as where opposing affidavits are submitted, the District Court cannot make the credibility determination by simply choosing between the affidavits without an evidentiary hearing. Daniels v. United States, 54 F.3d 290 (7th Cir. 1995); Castillo v. United States, 34 F.3d 443, 445 (7th Cir. 1994) ("[A] determination of credibility cannot be made on the basis of an affidavit"); United States v. Stuffle, (4th Cir. 1997).

CONCLUSION

Based on all of the foregoing, Movant Pacheco respectfully asks this Honorable Court to:

A) Find that the government opposition to her Section 2255 motion is not well taken; and,

B) Order an evidentiary hearing as set forth and requested in his Section 2255 motion so that he can prove his case

Respectfully Submitted,

This 25 day of Mar, 2015

HORACIO LICANO PACHECO

Horacio Licano Pacheco

Pro se

Fed. Reg. No: 81458-280

FCI HERLONG

FEDERAL CORRECTIONAL INSTITUTION

P.O. BOX 800

HERLONG, CA 96113

**CERTIFICATE OF SERVICE**

HORACIO L. PACHECO, Defendant, in the foregoing action state that on this 25 day of Mar, 2015, I have caused to be served a true and correct copy of the following;

**REPLY TO GOVERNMENT'S RESPONSE  
TO MOTION UNDER TITLE 28 USC SECTION 2255**

Which is deemed filed at the time it was delivered to prison authorities for forwarding to the court, Houston v. Lack 101 L.Ed. 2d 245 (1988), upon the court and parties to litigation and their attorneys of record, by placing same in a sealed, prepaid envelope with sufficient postage attached thereto to carry same to its destination, addressed to:

Stephen Gregory Garcia  
Assistant U.S. Attorney  
700 E. San Antonio Street  
Suite 200  
El Paso, TX 79901

and deposited same in the legal mail deposit box at the FEDERAL CORRECTIONAL INSTITUTION, HERLONG -P.O. BOX 800-HERLONG, CA 96113

I have read the foregoing and state the facts under personal knowledge are true and correct.

Executed this 25 day of Mar 2015, under penalty of perjury pursuant to Title 28 U.S.C. Section 1746.

HORACIO LICANO PACHECO

Horacio Licano Pacheco

Pro se

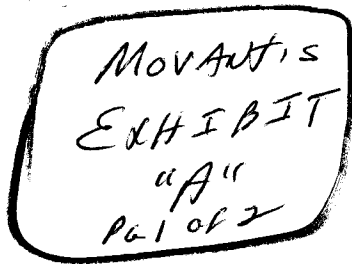
Fed. Reg. No: 81458-280

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FEDERAL CORRECTIONAL INSTITUTION

P.O. BOX 800

HERLONG, CA 96113



Affidavit

State of Texas

County of El Paso

The lawyer Robert Harris received us in his office more than ten times, which is Dunia R. Licano, Alexia Licano, Mario Rodriguez and Rosalina Pacheco so that we could talk about my husband's case.

My husband had the firm decision to go to a jury trial but Robert Harris supposedly said that by doing that it would add more time to his sentence, the district attorney Kaplan needed for Horacio Licano Pacheco to cooperate so that way he could have a minimum sentence. The Lawyer R. Harris lied by saying that it would be better if we went to a jury trial, but he actually forced Horacio Licano Pacheco to sign a plea agreement with lies (exhibit No. A case No. EP11CR1827\_KC6) affidavit.

Robert Harris never told us or Horacio Licano Pacheco that they would put charged towards the fire arm, until we found out after the plea agreement, the PSR came in and we complained to Robert Harris for not telling us about the fire arm charges and we pressured him to make an objection to the PSR as soon as possible.

We asked Robert Harris that if he could take Rogelio Macias, Luis Serrano and Armando Garcia to the evidence hearing so that way he could testify about the firer arm and the threat. The lawyer Robert Harris said that he had already filled in papers so that he could bring the three convicts that my husband asked for, but he never brought Rogelio Macias, or Luis Serrano, being said that we asked for them, he lies.

Robert Harris said that in the discovery there is various calls between Luis Serrano and Horacio Licano Pacheco and that they saw each other in a Big 8 Supermarket, the lawyer R. Harris lied due to the affidavit that he did (Government exhibit No. A case No. EP11CR1827KC6) he says that Luis Serrano does not know Horacio Licano Pacheco.


Therefore, I want to clarify that my husband Horacio Licano Pacheco did want to go to a jury trial but Robert Harris always stopped us.




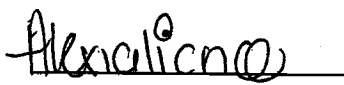
162  
OF 2  
EXHIBIT


I certify under penalty of perjury that the foregoing is true and correct.

Executed on this 25<sup>th</sup> day of February, 2015

  
Mario Rodriguez Villava

  
Dunia R. Licano

  
Alexia Licano

  
Rosalina Pacheco Jimenez

Acknowledgement

State of Texas

County of El Paso

Before me, the undersigned authority, in and for said county, Texas, on this day personally appeared Mario Rodriguez Villalva, Dunia R. Licano, Alexia Licano, Rosalina Pacheco Jimenez. Known to me to be the person who's name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration there in expressed.

Given under my hand and seal of office, this 25<sup>th</sup> day of February, 2015

  
Notary Public's Signature

Israel M. Hernandez  
Notary Name

Notary Public in and for the State of Texas

My Commission Expires: March 19, 2017

